

2010 WL 9010087 (Ohio Com.Pl.) (Trial Motion, Memorandum and Affidavit)

Court of Common Pleas of Ohio.

Montgomery County

Lucille B. REAVES, et al.,

v.

THE MARIA-JOSEPH CENTER, et al.

No. 2008CV10293.
March 5, 2010.

Plaintiffs' Motion for Partial Summary Judgment

Dwight D. Brannon (0021657), Attorney for Plaintiffs, Brannon & Associates, 130 W. Second St. Suite 900, Dayton, OH 45402, Telephone: (937) 228-2306, Facsimile: (937) 228-8475, E-Mail: dbrannon@branlaw.com.

(Judge [Mary L. Wiseman](#)).

Now come the Plaintiffs, Lucille B. Reaves, et al., by and through counsel, and do hereby make application to this Honorable Court, pursuant to Civ. R. 56, for partial summary judgment against the Defendant Fidelity Health Care ("Fidelity") with respect to three issues. First, that Defendant Fidelity be held liable for any wrongful conduct by its employee under the doctrine of respondeat superior. Second, that a judgment of liability be entered in Plaintiffs' favor based on the undisputed evidence of the Defendant's wrongful conduct (including negligence and reckless, wanton and willful behavior, both directly and through its employee). And, third, that the issue of punitive damages be submitted to a jury with an appropriate punitive damages instruction.

Plaintiff requests that the Court schedule a non-oral hearing date on this motion and, after the date of the hearing, that the Court enter judgment against the Defendant on the issue of liability in accordance with Plaintiffs' Complaint. It is further requested that, upon granting judgment, the Court maintain the current trial date and allow trial to go forward for determination of the Plaintiffs' damages. A memorandum in support of this motion follows.

MEMORANDUM OF LAW

I. STATEMENT OF THE FACTS

Lucille Reaves, age 87, was a long-time resident of Maria-Joseph Nursing Home, having been admitted in February, 2000, after she suffered a [stroke](#). She suffered from various ailments, including [dementia](#), while she was a resident at Maria-Joseph. Despite her ailments, she continued to activity participate in activities at the nursing home, particularly in spiritual events. She did have some decreased vision as a result of the [stroke](#) and because of cataracts, particularly in her right eye. However, she was able to read large print with glasses, could read her Bible, would enjoy watching television, and could follow objects with her eyes. Since her injury, she has been unable to watch television or engage with others with the same level of interest. (Linda Atwood Depo., p. 27.)

On April 21, 2008, Lucille was having dinner in her room at the nursing home. Ruth Jones, a nurse's assistant, was tasked with getting Lucille ready for dinner. Jones decided not to take Lucille to the dining room that evening because when she tried to do so, Jones reported, Lucille told the aide to leave her alone. (Exhibit 1A, Police Report of Jeremy Kinder ("Report"), at p. 11.) Jones began delivering dinner trays at 5:45 p.m., and delivered Lucille's dinner tray to her at approximately 6:30 p.m., one of the last residents to whom she brought food. Jones returned to get the tray approximately fifteen minutes later, at 6:45 p.m.

(Report, at 11) Jones reported that Lucille had thrown food and spilled water on the floor. (Report, at 11). She confronted Lucille and asked why she threw the food, and Lucille denied doing it. (Report, at 11.)

Soon thereafter Jones reported to Sade Griffin and Heather Mayerer, two other Maria-Joseph nurse's assistants, at the nursing station, that she had come into the room and Lucille was waiving a spoon around and had injured her eye. (Report, p. 20-21, Statement of Sade Griffin, Statement of Heather Mayerer) Jones reported that Lucille's eye was bleeding. (Report, p. 21, Statement of Heather Mayerer) Jones also reported that Lucille had asked her "Why did you hit me in the eye?" (Report, p. 20, Statement of Sade Griffin)

Jones, Griffin, and Mayerer then proceeded to Lucille's room to examine her and give her first aid. At that time, Lucille asked Jones again, "Why did you hit me in the eye?" or stated "Ruth, you hit me in the eye." (Report, p. 20-21, Statement of Sade Griffin, Statement of Heather Mayerer). Jones then responded by saying "Lucille, you know that I didn't hurt you." (Report, p. 21, Statement of Heather Mayerer; Report, p. 16, Statement of Ruth Jones)

The emergency squad was called and Jones was transported to Good Samaritan Hospital Emergency Room. When the Trotwood Fire & Rescue Squad arrived to transport Lucille to the Emergency Room, they were advised by the nursing staff that the patient had struck herself in the eye with a spoon. While in the emergency room at Good Samaritan, Lucille told the emergency room nurse that Jones had hit her in the eye. Lucille stated that she had been mouthing off and that Jones did not like her. Lucille reported that she had extreme pain in her left eye and had no vision. (Exhibit 4, Certified Good Samaritan Medical Records) Ms. Reaves later confirmed in her deposition that she had been punched in the eye in the nursing home. (Lucille Reaves Depo., p. 14-15)¹ Dr. Lachs, who has extensive expertise in **elder abuse** and the investigation of **abuse**, has opined, in light of the circumstances of the case and the evidence regarding the nature and extent of the injury, that Ms. Reaves was struck in the eye by Ruth Jones and that her injuries were inconsistent with either self-inflicted injury or accidental injury, given the implausible mechanism offered by Ms. Jones. (Lachs Depo. 78-83.)

Dr. Robert Peets was called to the emergency room to examine Lucille. His examination revealed a traumatic global rupture of the left eye and possible expulsion of the patient's previous **corneal transplant**. Dr. Peets had Lucille transferred to Grandview Hospital for surgical exploration and repair of the left eye. Dr. Peets performed surgery and found that the intraocular contents were expelled outside the eye and there was blood running from the eye down Lucille's cheek and neck. (See Exhibit 5, Diagram) The eye continued to bleed during the process. She had to undergo surgery with Dr. Peets and followed up with Dr. Beeson as well as her original ophthalmologist. Lucille remained hospitalized until April 29, 2009 at which time she was placed in Friendship Village Nursing Home. As a result of this incident, Lucille Reaves no longer has any vision in her left eye. (Exhibit 6, Certified Grandview Medical Record)²

Ruth Jones had worked at the Maria-Joseph Nursing Home since May 28, 1998, as a Nursing Assistant. (Exhibit 2A, Personnel Record, BGL000089) As a Nurse's Assistant at Maria-Joseph, one of her primary responsibilities was providing care and assistance to the home's **elderly** and invalided residents. Jones worked on the same floor that Lucille resided on and had during the five years that Lucille had lived in that residence.

On December 2, 2002, while she was employed at the Maria-Joseph Home, Jones pleaded guilty to two counts of assault on a police officer in violation of **R.C. 2903.13(A)** and two counts of misdemeanor assault as lesser included offenses. (Exhibit 3, Certified Copy of Jones' Waiver and Plea). In July of 1991, before she began working at Maria-Joseph, Jones had also been arrested for assault and for resisting arrest. (Exhibit 2B, Arrest Record)

In 2004, Jones engaged in a persistent pattern of resident-care violations that nearly led to her termination. (Lachs Depo., p. 112) She failed to provide adequate care to residents. One patient defecated or urinated in his or her adult brief or clothing, and Jones left the patient in that condition for 30 minutes. (Exhibit 2A, Maria-Joseph Corrective Action Form, BGL0000010; Lachs Depo., p. 111.) In February of that year, Jones failed to use appropriate techniques during care provided for her residents, and she was disciplined for handling a patient in a "rough manner." (Exhibit 2A, Maria-Joseph Corrective Action Form, BGL000009;

Lachs Depo., p. 111.). Finally, in July 2004, she was given a “final consultation” after she “failed to provide safe environment for resident when he was smoking.” (Exhibit 2A, Maria-Joseph Corrective Action Form, BGL000008; Lachs Depo., p. 112.)

At approximately this same time, in May 2004, Maria-Joseph ran a new background check on Ruth Jones through the online database of the HHS Office of Inspector General. That database would find providers who were rendered ineligible for Medicare, Medicaid and other Federal healthcare programs due to fraud or other kinds of criminal problems. (Lachs Depo., pp. 109-111.) It was not a complete criminal background check, however. Had Maria-Joseph run a criminal-record check on Ruth Jones in 2004, as she was facing possible termination, and after disciplining her for roughness with one of the residents, it should have discovered her 2002 conviction for assaulting a police officer.

Later, in March of 2008, Jones was again disciplined for being mean to one of the residents, Frances Morrison, and she was no longer permitted to work with that resident. (Report, p. 12.) She refused to sign the corrective action form for this infraction. (Exhibit 2A, Maria-Joseph Corrective Action Form, BGL000001) Previously, in September 2007, Jones had also been disciplined for a “failure of hospitality” toward a co-worker. (Exhibit 2A, Maria-Joseph Corrective Action Form, BGL000002) Neither of these two incidents appears to have resulted in an investigation and the details of the incidents have not been recorded. (Lachs Depo., pp. 87, 111.)

Maria-Joseph ostensibly maintains a policy of zero tolerance in regard to **abuse**—mental, verbal, and physical—toward residents. (Lachs Depo., pp. 106, 130; Exhibit D.) The evidence shows that Maria-Joseph repeatedly turned a blind eye toward **abusive** behavior toward residents or other bad behavior by Ms. Jones. Incidents were reported, but there were no details recorded and no serious investigations performed. This failure to investigate and failure to record statements allowed incidents involving probable **abuse** to go unrecorded. This culminated with a letter to officers of the Ohio Department of Health by Sharon Thornton, President and CEO of Maria-Joseph, denying that the incident involving Ms. Reaves could be classified as **abuse**. (Exhibit 7, Letter of May, 2008) Ms. Thornton issued this denial even as Fidelity was aware of the Ms. Reaves' medical records showing that she had been assaulted and battered and was aware of the police investigation and findings that would shortly lead to Ms. Jones indictment.

As Plaintiff's expert Dr. Mark S. Lachs, a renowned expert on Geriatrics and **Elder** care (see Exhibit 8, curriculum vita), stated that this is not a “zero tolerance policy” toward **abuse**, it is “just an unwillingness to consider the possibility that this is what happened.” (Lachs Depo., p. 133.) Indeed, Ms. Reaves made statements that she had been hit in the eye, statements that appear in her medical records at Grandview and Good Samaritan Hospitals. Ms. Reaves' statements, to which Maria-Joseph had access, appear nowhere in the records of the investigation. Dr. Lachs has characterized this behavior as a “reckless disregard and a conscious disregard for the rights and safety of Mrs. Reaves.” (Lachs Depo., p. 169.)

Ruth Jones was interviewed by Det. Jeremy Kinder of the Trotwood Police Department on April 23, 2008, two days after Ms. Reaves' injuries. Initially, Ms. Jones denied any knowledge of the injury to Lucille Reaves' left eye, stating that she only saw it when she returned to Lucille's room after collecting the dinner tray. (Report, p. 16, Statement of Ruth Jones) 10. Jones then took a voice-stress test and was told that she failed. Detective Kinder and Detective Faulkner, who had administered the test, told her that they wanted to know what really happened, and Jones began to tear up. Faulkner left the room and Kinder continued to question her. Jones replied that “It all happened so fast.” Ruth Jones then told Det. Kinder that she had hit Lucille Reaves in the face with her elbow on the night of April 21, 2008, when she was removing Reaves's dinner tray. Jones states that she was angry when she removed the tray. However, she stated that hitting Lucille Reaves with her elbow was an accident. (Report, p. 13, 17; Statement of Ruth Jones.)

Although Ms. Jones is now deceased, her statement is certainly admissible evidence that may be offered by the Plaintiffs against her former employer. The statement is admissible under **Evid.R. 801(D)(2)** as a statement of a party opponent, as it was a statement by Ms. Jones while she was still a Maria-Joseph employee. See **Evid.R. 801(D)(2)** (“the statement is entered against a party and is... (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made

during the existence of the relationship.”) The statement is also admissible pursuant to [Evid.R. 804\(B\)\(3\)](#) as a statement against interest by an unavailable declarant. See [Evid.R. 804 \(B\)\(3\)](#).

Ruth Jones had told Kinder that she had been disciplined in the previous month for “being mean” to a resident named Frances Morrison and she was told that she could no longer assist that patient. The fact that discipline had been given is confirmed by Jones’s personnel record, provided by Defendants. (Report, at 12) In February 2004, Jones had also been disciplined for handling a patient in a “rough manner.” (Exhibit 2A, Maria-Joseph Corrective Action Form, March 6, 2008, BGL000009)

Charges were subsequently filed in the Montgomery County Common Pleas Court in *State v. Jones*, 2008-CR-01803 charging Ruth Jones with recklessly causing serious physical harm to a functionally impaired person in violation of [R.C. 2903.10\(A\)](#). These charges were eventually dismissed because of the death of Ruth Jones on January 29, 2009. Investigation by Plaintiffs further revealed that Ruth Jones had previously been prosecuted in the Montgomery County Common Pleas Court in Case No. 2002-CR-03401 for assault on a police officer in violation of [R.C. 2903.13\(A\)](#) and had, prior to that time, in July 1991, been prosecuted for Assault and Resisting Arrest.

II. ARGUMENT

A. Summary Judgment Standard.

Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Civil Rules, which are, as a whole, designed to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 327, 106 S.Ct. 2548, 2554-55. Under Civil Rule 56(C), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 287, 662 N.E.2d 264, quoting [Fed.R.Civ.P. 56](#).

The burden of showing that no genuine issue exists as to any material fact falls upon the party requesting summary judgment. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. When sustained, an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but his or her response, by affidavit or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If he or she does not so respond, summary judgment, if appropriate, shall be entered against him or her. [Civ.R 56\(E\)](#); *Dresher*, 75 Ohio St.3d at 293, citing [Civ.R.56](#).

The substantive law determines whether a genuine issue of material fact remains. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505; *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123. As provided in Anderson, “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248.

There are no factual issues in this case with respect to whether Ruth Jones struck and ultimately blinded Lucille Reaves’ left eye. Regardless, Fidelity is wholly liable for both the negligent and intentional acts of its employee, Ruth Jones, under the doctrine of respondeat superior. Furthermore, Fidelity is liable as a matter of law for its negligence and recklessness in hiring Ruth Jones and employing Ruth Jones after her conviction for assaulting a police officer and after it had previously disciplined her for “being mean” to a resident. It is further liable for its subsequent ratification of Jones’ misconduct. There is no genuine issue of fact, furthermore, that Lucille Reaves’ injuries were proximately caused by Jones’s act of striking her, whether negligently or intentionally. Therefore, partial summary judgment on liability must be granted in Plaintiffs’ favor.

B. Fidelity is liable under Respondeat Superior.

Fidelity is generally responsible for the behavior, acts, and deeds of its employees. As an initial matter, it must be noted that Ruth Jones, in her statement to police, asserted that her injury to Ms. Reaves was negligent. Certainly, Fidelity is responsible

for the negligent acts of its employees. There is no question that if, as Jones stated, she accidentally elbowed Lucille Reaves in the eye, then Fidelity would be responsible for that negligence on a respondeat superior basis. In light of Jones' admission, there is no genuine issue of fact whether Jones hit Lucille Reaves on the night of April 21, 2008.

In fact, there is no doubt that the injury to Ms. Reaves eye was caused by an intentional blow. Ms. Reaves statements at Maria Joseph, and later at the hospital, and her deposition testimony all show that she had been purposely hit. Dr. Lachs has confirmed that Ms. Reaves injuries were inconsistent with an accidental injury. (Lachs Depo. 78-83.)

Under Ohio law, even if Jones assaulted Ms. Reaves and used excessive force against her, this fact alone does not remove the case from application of the respondeat superior doctrine. Neither does it prevent an award of punitive damages, in addition to compensatory damages, or recovery of attorney's fees and costs as additional compensatory damages. "The willful and malicious character of an employee's act does not always, as a matter of law, remove the act from the scope of employment." *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 330, citing *Stranahan Bros. Catering Co. v. Coit* (1896), 55 Ohio St. 398, 410, 45 N.E. 634, and *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246, 19 Ohio B. 398, 484 N.E.2d 280. "When an employee diverts from the straight and narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is so divergent that its very character severs the relationship of employer and employee." *Id.*, quoting *Wiebold Studio*, 19 Ohio App.3d at 250. As the Second District Court of Appeals recently noted, "The relevant inquiry...is not whether the use of force was authorized, or justified under the circumstances, but whether that force was used to facilitate or promote [the employer's] business." *Grubb v. Sec. Nat'l Bank & Trust Co.*, 2d Dist. No. 06-CA-30, 2007-Ohio-1034, 111.

Providing care to unruly patients is an ordinary task that falls to health care workers in Ruth Jones' position. (Exhibit 8, Affidavit of Dr. Lachs, ¶ 7) As Dr. Lachs has noted, dementia frequently causes unruliness, anxiousness, hysteria, and other personality disturbances for residents of nursing homes. Nurse's assistants are required to deal with such disturbances as a regular part of their employment. In this case, Lucille Reaves suffers from periodic **dementia**. Ruth Jones' use of excessive force against Ms. Reaves, though clearly **abusive**, did not remove her conduct from the scope of her employment.

In this way, the case at bar is analogous to *Rodebush v. Oklahoma Nursing Homes* (Okla. 1993), 867 P.2d 1241. In that case, the Oklahoma Supreme Court considered a claim involving a nurse's aid who delivered several blows to the face of an **elderly**, occasionally combative, Alzheimer's patient. The State Supreme Court held that, although it is not generally within the scope of an employee's employment to commit an assault upon a third person, "the general rule does not apply when the act is one which is 'fairly and naturally incident to the business', and is done 'while the servant was engaged upon the master's business and be done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.'" *Id.* at 1245, quoting *Russell-Locke Super-Service Inc. v. Vaughn* (1935), 170 Okl. 377, 40 P.2d 1090, 1094 (1935). Oklahoma law is precisely analogous to Ohio law in this regard. See, e.g., *Rouda v. Lowry & Goebel Co.* (1st Dist. 1917), 9 Ohio App. 91 ("[I]t may be said that an act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.") The Oklahoma Court held that the aide was acting within the course and scope of his duties, even while committing an intentional tort:

In the present case the nurse's aide was assigned the duty of bathing residents. It was also a known fact that Alzheimer patients may be combative. The nursing home was in the business of taking care of Alzheimer patients. In this particular case, Rodebush was known to be particularly combative when being bathed. The nurse's aide had not deviated from his assigned duties, and was carrying out an assigned task when the slapping occurred.

Rodebush, 867 P.2d at 1246.

There is, furthermore, a strong argument for treating the duty of care to patients as non-delegable, holding nursing homes strictly liable for patient assaults. See Adam A. Milani, “Patient Assaults: Health Care Providers Owe a Non-Delegable Duty to Their Patients and Should be Held Liable for Employee Assaults Whether or Not Within the Scope of Employment.” 21 Ohio N.U.L. Re. 1147 (1995). Here, where Jones' conduct clearly fell within the scope of her employment, and where the employer's own conduct created liability, there is no need to reach this more extensive concept of employer liability. Fidelity is liable as a matter of law under the respondeat superior doctrine.

B. Fidelity is liable as a matter of law for its own direct wrongful conduct in employing Ruth Jones and in investigating her misconduct

Furthermore, in this particular incident, Fidelity was aware, or should have been aware, that Ruth Jones, prior to this incident, had been arrested twice for assault, including once for assault on a police officer, and was convicted on two counts for the latter offense in 2002. Fidelity was certainly aware that Ruth Jones had been disciplined in the past while employed at Maria-Joseph for “being mean” to another patient. Fidelity knew, or should have known, that Ruth Jones had a drinking problem. Fidelity further knew that Ruth Jones had a propensity toward anger and was angry on this particular occasion because she had been given too much work to do and too many other patients to care for.

[Ohio Administrative Code 3701-17-07](#) states that: “no nursing home shall employ a person who applies on or after January 27, 1997, for a position that involves the provision of direct care to an older adult, if the person: (1) Has been convicted of or pleaded guilty to an offense listed in [division \(C\)\(1\) of section 3721.121 of the Revised Code...](#)”

[Ohio Revised Code Section 3721.121](#) provides:

“Except as provided in rules adopted by the director of health in accordance with division (F) of this section and subject to division (C)(2) of this section, no home... shall employ a person in a position that involves providing direct care to an older adult if the person has been convicted of or pleaded guilty to any of the following:

(a)... 2903.13

The statute, in fact, applies to all persons hired after the effective date of the statute in 1997. Ruth Jones began work for Maria-Joseph in 1998. Ruth Jones was found guilty on December 31, 2002 of two counts of assault in violation of [Ohio Revised Code § 2903.13\(A\)](#). (Exhibit 3, Certified Copy of Jones' Waiver and Plea). She also has a previous arrest for assault in 1991. Fidelity knew, or should have known, that Ruth Jones had a propensity for violence and should never have employed her. The fact that it did, in violation of the law, makes the nursing home liable for the injuries inflicted upon Lucille Reaves by Ruth Jones as a matter of law.

[R.C. 3721.121](#) has not been cited by or interpreted by any case authorities. The language of the statute, however: “no home...shall employ a person,” is analogous to that used in other statutes with similar proscriptions against employing individuals who have been convicted of certain crimes. Those statutes, like [R.C. 3721.121](#), bar both hiring and continued employment, as should be obvious from the use of the words “employ persons” as opposed to “hire applicants” In *Brown v. Columbus Bd. of Educ.* (S.D. Ohio 2009), 638 F. Supp. 2d 856, 864 the federal court noted the applicability of a parallel statute, [R.C. 3319.39\(B\)\(1\)](#), to the circumstances of a teacher who, like Ruth Jones, was convicted of assault on a police officer in an incident that occurred during his employment with the Columbus Public Schools. In *Brown*, as in the case at bar, the conviction occurred after the employee had been hired and had been working for some time. *Id.* Just as the Court noted in *Brown*, the proscription against “employing” a person who has been convicted of a crime of violence applies both to applicants and long-term employees.

Indeed Maria-Joseph's own policies recognize that criminal convictions may render an employee ineligible for "continued employment" under both state and federal law, and require an employee to self-report any convictions or findings that would disqualify them. (Lachs Depo., p. 106-07, Exhibit D.) Ruth Jones did not self-report, however. Maria-Joseph's "Annual Compliance Statement," which it required each employee to sign, failed to inform employees of their continuing obligation to report convictions for violence that would render them ineligible for employment under state law. Maria-Josephs also failed to follow-up on its background checks of Ruth Jones.

Negligence *per se* may be established by violation of a statutory duty. *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367; *Becker v. Shaull* (1992), 62 Ohio St.3d 480, 483. In *Eisenhuth* the Supreme Court of Ohio addressed the issue of negligence *per se* with regard to violation of a safety statute:

Where legislative enactment imposes upon any person a specific duty for the protection of others, and his neglect to perform that duty proximately results in injury to such another, he is negligent *per se* or as a matter of law... Where there exists a legislative enactment commanding or prohibiting for the safety of others the doing of a specific act and there is a violation of such enactment solely by one whose duty it is to obey it, such violation constitutes negligence *per se*....

Eisenhuth, 161 Ohio St. at 370. Thus, where a defendant has violated "a positive and definite standard of care" which is intended to protect a given class of people, the plaintiff is a member of that class of people, and the plaintiff has been injured in the way the statute is meant to prevent, the defendant is guilty of negligence *per se*. *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, 496, quoting *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, quoting *Eisenhuth*, 161 Ohio St. at 374-375. While a finding of negligence *per se* is not a finding of liability, it relieves the plaintiff of the burden of proving the existence and breach of a duty, leaving only the elements of damages and proximate cause. *Sikora*, 88 Ohio St.3d at 397.

In the case at bar, **R.C. 3721.121** exists to protect the residents of nursing homes by keeping persons convicted of certain crimes from being employed by nursing homes. Mrs. Reaves is a resident of a nursing home; one of the class of people the statute seeks to protect. Ruth Jones was a person who was convicted of one of the crimes listed in **R.C. 3721.121**; one of the class of people forbidden from being employed by a nursing home. Mrs. Reaves was injured by Jones, either negligently or intentionally; the exact injury against which the statute seeks to protect. Thus Fidelity's employment of Jones, in violation of the statute, proximately caused harm to Mrs. Reaves, the person whom the statute sought to protect. Fidelity is thus negligent *per se*.

R.C. 3721.121(H)(1), which creates a kind of safe-harbor for nursing homes who perform background checks, does not relieve Fidelity of liability for negligence in this case. That subsection provides, in relevant part:

(H) In a tort or other civil action for damages that is brought as the result of an injury, death, or loss to person or property caused by an individual who a home or adult day-care program employs in a position that involves providing direct care to older adults, all of the following shall apply:

(1) If the home or program employed the individual in good faith and reasonable reliance on the report of a criminal records check requested under this section, the home or program shall not be found negligent solely because of its reliance on the report, even if the information in the report is determined later to have been incomplete or inaccurate.

The safe-harbor created by this subsection only protects employers who reasonably rely on background checks that have been performed where the information recovered appeared accurate but later proved incomplete or inaccurate. Even if Maria-Joseph performed the requisite criminal background check on Ruth Jones when it first hired her, which is not apparent as no report appears in her file (see Lachs Depo., p. 109.), that background check could not relieve them of liability for failing to run a proper background check for the intervening years between 2002 and 2008, when Lucille Reaves was injured.

As Dr. Lachs testified, there were numerous opportunities for Fidelity to discover Ms. Jones criminal conviction for assault during the intervening years, but it failed to do so. (Lachs Depo., p. 109-11, 123-25) These included Ruth Jones' unexplained absence when she was serving her sentence for her assault conviction, during 2004 when she had been disciplined for roughness toward a resident, discipline for neglect, was facing termination after a final consultation notice had been issued. Maria-Joseph even ran a background check in 2004 to see if Ruth Jones have become ineligible to provide care for Medicare or Medicaid. But, it did not search for criminal convictions.

It should be noted, moreover, that the laws of the United States and of Ohio protect the rights of our **elderly** and in particular those in nursing homes. [Ohio R.C. 3721.13](#) sets forth the residents' rights in a nursing home. Specifically, [R.C. 3721.13\(A\) \(2\)](#) states:

“The right to be free from physical, verbal, mental, and emotional **abuse** and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality”

Furthermore, in this particular incident, employees at Maria-Joseph Nursing Home, and in particular the Chief Clinical Officer, Penny Watkins, and the Director of Nursing, Cynthia Thornton, were aware of the allegations made by Lucille Reaves. They saw the blood on Mrs. Reaves' face and knew that Mrs. Reaves stated that “Ruth hurt my eye,” yet they did nothing, instead accepting Ruth Jones' side of the story as the truth and then attempting to place the blame on the patient.

Fidelity's negligence in this case is clear. Plaintiffs' expert Dr. Mark S. Lachs has stated that this case involves the most clearly documented case of violence committed by a nursing home staff member he has seen in over twenty years of research into **elder abuse**. (Exhibit 8, Affidavit of Dr. Lachs, ¶ 8) Dr. Lachs has opined that the nursing home in this case failed to conduct background checks that would have discovered Ruth Jones' conviction for criminal violence and that it was negligent in doing so. (Exhibit 8, Affidavit of Dr. Lachs, ¶ 9; Lachs Depo., p. 162) In fact, Dr. Lachs has stated his belief that the nursing home in this case failed “spectacularly.” (Exhibit 8, Affidavit of Dr. Lachs, Report attached) Indeed, Dr. Lachs has testified that, through the years of Ruth Jones' employment, Fidelity showed reckless disregard and a conscious disregard for the zero-tolerance policy toward **abuse** that Maria-Joseph had ostensibly adopted and set forth in its written documents.

Dr. Lachs has opined that Fidelity showed reckless disregard in failing to appropriately investigate the circumstances of Lucille Reaves' injuries. (Lachs Depo., p. 167.) He further testified that Fidelity acted recklessly in ignoring Lucille Reaves' statements describing how her injuries occurred as a result of being struck, which appeared in her medical records. (Lachs Depo., p. 168-69.) And, Dr. Lachs testified that the refusal to acknowledge that **abuse** occurred in this case, as exemplified in Ms. Thornton's letter, was itself an act of reckless disregard for the rights and safety of residents. (Lachs Depo., p. 171)

On these facts, which are not seriously in dispute, Fidelity must be held liable for negligent hiring and employment of Ruth Jones as a matter of law. The degree of the liability is egregious, and constitutes reckless, wanton, willful, and malicious conduct, as well.

C. Fidelity is liable through ratification

Generally, acts committed within the scope of employment will be authorized, the doctrine of *respondeat superior* liability will apply and the plaintiff need not prove ratification to hold the employer liable. [Fulwiler v. Schneider](#) (1995), 104 Ohio App.3d 398, 400, 662 N.E.2d 82, 86-87. As explained above, Fidelity must be held liable in this case based on application of ordinary respondeat principles. [Grubb v. Sec. Nat'l Bank & Trust Co.](#), 2d Dist. No. 06-CA-30, 2007-Ohio-1034, ¶ 11. Likewise, Fidelity is liable for its own negligent misconduct.

Nevertheless, even if Ruth Jones had not acted within the course of her employment as a matter of law, and even if Fidelity could raise issues of fact with respect to its liability for its own negligence, liability would still be found in this case as a

matter of law based on Fidelity's subsequent ratification of Ruth Jones' misconduct. Ratification "occurs when the employer with full knowledge of the facts, acts in a manner that manifests an intention to approve the unauthorized act of the agent-employee." *Davis v. May Dep't Stores Co.*, 9th Dist. No. 20396, 2001-Ohio-1362; see also *Bardonaro v. Gen. Motors Corp.* (Aug. 4, 2000), Montgomery App. No. 18063, 2000 Ohio App. LEXIS 3479, *10-11 (concluding that the employer's subsequent actions, including payment of its employee's legal fees, was sufficient to support a finding that the employer had ratified the employee's conduct.)

In the case at bar, long after the evidence had been made clear, long after Lucille Reaves had reported that she had been hit, the CEO continued to misrepresent affirmatively and without consent that Ruth Jones "accidentally hit the resident's eye," as she had reported to police, even as it terminated her employment for "providing false information." The CEO, Ms. Thornton, insisted to state investigators that the incident resulting in Ms Reaves injury "cannot be abuse." (Exhibit 8.) Dr. Lachs testified that there was "no reasonable basis" for Ms. Thornton to continue to insist that there was no abuse. Furthermore, he opined that Fidelity's refusal to acknowledge that abuse occurred constituted reckless disregard both for the rights and safety of the residents and toward Fidelity's own policies. (Lachs Depo., p. 168-170)

Ratification may occur where there was a failure to investigate misconduct. *Marchese v. Lucas* (1985), 758 F.2d 181, 182. As Dr. Lachs testified, there was a complete failure to investigate the circumstances showing abuse in this case on the part of Fidelity/Maria-Joseph. Fidelity ignored the statements of Ms. Reaves, in her medical records, indicating that this was an assault, and insisted that there was no evidence that this injury was wilful. (Exhibit 8, Lachs Depo., p. 133.). Here, Fidelity turned a blind eye to evidence of abuse, as it had throughout Ruth Jones' employment. It then insisted that this was only an accident with no reasonable basis for doing so. This constitutes ratification of an employee's conduct. Fidelity is liable as a matter of law on this basis as well as those set forth above.

Furthermore, as in *Bardonaro*, Fidelity has ratified Ms. Jones conduct though undertaking to pay for her representation and representations for her estate throughout the course of this litigation. Despite the absence of any assets in the Estate to protect, Fidelity has provided Ms. Jones and Ms. Jones Estate with counsel and had counsel file papers on her behalf denying liability, affirmatively asserting that Ms. Jones was not responsible for Ms. Reaves injuries, even negligently. Through this course of conduct, as was the case in *Bardonaro*, Fidelity has ratified Ms. Jones' conduct. In light of this conduct, and in light of the other unrefuted evidence of ratification, the Plaintiffs are entitled to judgment of liability against Defendant Fidelity.

D. A Punitive Damages Instruction

Finally, Plaintiffs ask that the Court decide, in connection with this motion for summary judgment, that Plaintiffs are entitled to a punitive damages instruction and that the issue of punitive damages be submitted to the jury for consideration of an appropriate punitive award, including attorney's fees.

An employer may be held liable for punitive damages in connection with the acts of its employees where "it authorized, participated in, or ratified the actions of its employees." *Davis v. May Dep't Stores Co.*, 9th Dist. No. 20396, 2001-Ohio-1362, 2001 Ohio App. LEXIS 4321, *17; *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 32 O.O. 454, 66 N.E.2d 224, paragraph three of the syllabus. "Generally, acts committed within the scope of employment will be authorized, either expressly or impliedly, by the employer." *Fulwiler v. Schneider* (1995), 104 Ohio App.3d 398, 406, 662 N.E.2d 82. Thus, where an employee commits an intentional tort within the scope of his or her employment, punitive damages may be awarded against the employer. *Davis*, 2001-Ohio-1362, 2001 Ohio App. LEXIS 4321, at *17-18. Based on these principles alone, this case is one in which a punitive damage instruction is appropriate as a matter of law.

Furthermore, even slight acts of ratification will be sufficient to support a claim for punitive damages against an employer. *Davis*, 2001-Ohio-1362, citing *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 430. There is, as set forth above, irrefutable evidence of ratification in the case at bar.

Finally, there is evidence of gross neglect in this case based on Fidelity's employment of Ruth Jones without conducting a periodic background check that would have discovered her conviction for criminal violence. As Dr. Lachs has noted, the nursing home in this case failed "spectacularly." Defendant Fidelity acted with reckless disregard for the rights and safety of its residents in this case. On these facts also, a punitive damages instruction is appropriate and Plaintiffs are entitled to one as a matter of law.

III. CONCLUSION

Maria-Joseph Nursing Home is liable as a matter of law for the acts of Ruth Jones, both under the doctrine of *respondeat superior* and for its own negligence, recklessness, and/or intentional misconduct in hiring, retaining, and supervising Ms. Jones in light of her prior arrests and convictions and propensity toward violence. Plaintiffs are entitled to judgment as a matter of law and Plaintiffs' motion for partial summary judgment must be granted.

This is a case, moreover, where the employer is liable for the intentional misconduct of an employee performed within the scope of her employment. Furthermore, there is evidence that Defendant Fidelity acted with gross negligence toward Lucille Reaves in continuing to employ Ruth Jones. The Court should, as part of its summary judgment decision, allow a punitive damages instruction to be submitted to the jury and allow the jury to consider what an appropriate award of punitive damages would be in this case. There could be no more appropriate circumstances for a jury to consider a punitive damages award against an employer than in this case.

Respectfully submitted,

/s/ *Dwight D. Brannon*

Dwight D. Brannon (0021657)

Attorney for Plaintiffs

BRANNON & ASSOCIATES

130 W. Second St. Suite 900

Dayton, OH 45402

Telephone: (937) 228-2306

Facsimile: (937) 228-8475

E-Mail: *dbrannon@branlaw.com*

Footnotes

- ¹ Ms. Reaves video deposition, which has been filed as part of the record in this case, contains a more clear record of Ms. Reaves statement of what occurred as she physically demonstrated how she had been hit.
- ² All medical records and bills are being filed with this Motion under [R.C. 2317.421](#) and [2317.422](#) and are admissible pursuant to those statutes and [Evid.R. 803\(6\)](#) and [801\(D\)\(2\)](#).